

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. ELVIN WILLIAMS

Direct Appeal from the Criminal Court for Davidson County
No. 2005-I-1139 Seth Norman, Judge

No. M2006-00287-CCA-R3-CO - Filed February 22, 2007

The defendant, Elvin Williams, pled guilty to the sale of less than .5 grams of cocaine and received an agreed upon sentence of six years and one month. Thereafter, the trial court ordered the defendant to serve his sentence in the Department of Correction. Following the dismissal of his motion for reduction of sentence, the defendant appealed. On appeal, the defendant argues that the trial court erred in finding that it was divested of jurisdiction pursuant to Tennessee Code Annotated section 40-35-212 and denying his motion for reduction of sentence. Following our review of the parties' briefs and applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Elvin Williams, Pro Se, Hardeman County Correctional Facility, Whiteville, Tennessee.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This appeal stems from the defendant's illegal act of selling cocaine. A Davidson County Grand Jury indicted the defendant for the sale of less than .5 grams of cocaine. On September 26, 2005, the defendant pled guilty to the offense and received a sentence of six years and one month. On November 9, 2005, the defendant was ordered to serve his sentence in the Department of Correction. Subsequently, on January 10, 2006, the defendant filed a pro se motion for reduction of sentence under Tenn. R. Crim. P. 35(d). In this motion, the defendant requested alternative sentencing. On January 20, 2006, the trial court entered an order denying the defendant's motion. In its order, the court found that it retained no jurisdiction to modify the defendant's sentence

because, pursuant to Tennessee Code Annotated section 40-35-212, the defendant was in the physical custody of the Tennessee Department of Correction.

On appeal, the defendant argues that the court misconstrued section 40-35-212 and failed to consider the statute in light of Rule 35 of the Tennessee Rules of Criminal Procedure.

Rule 35 of the Tennessee Rules of Criminal Procedure reads as follows:

- (a) Timing of Motion. The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.
- (b) Limits of Sentence Modification. The court may reduce a sentence only to one the court could have originally imposed.
- (c) Hearing Unnecessary. The trial court may deny a motion for reduction of sentence under this rule without a hearing.
- (d) Appeal. The defendant may appeal the denial of a motion for reduction of sentence but shall not be entitled to release on bond unless already under bond. If the court modifies the sentence, the state may appeal as otherwise provided by law.

As the Comment to this rule indicates, the purpose of this rule is to “allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice. The modification permitted by this rule is any modification otherwise permitted by the law” This rule does not vest the defendant with a remedy as of right. To the contrary, this rule commits the granting of relief to the sound discretion of the trial court. Moreover, the Comment to this rule expressly states that pursuant to Tennessee Code Annotated section 40-35-212, the trial court “retains jurisdiction to modify any sentence which is to be served in the jail or workhouse. However, the statute deprives the court of authority to modify a sentence to the department of corrections once the judgment is final in the trial court.”

Pursuant to Tennessee Code Annotated section 40-35-212(d)(1), the trial court shall “retain full jurisdiction over a defendant sentenced to the department during the time the defendant is being housed in a local jail or workhouse awaiting transfer to the department. Such jurisdiction shall continue until such time as the defendant is actually transferred to the physical custody of the department.”

The record reflects that the defendant was transferred to the physical custody of the Department of Correction prior to requesting a sentence reduction. Once the defendant was transferred to the custody of the Department of Correction, the trial court lost jurisdiction over the defendant’s sentence. *See* Tenn. Code Ann. § 40-35-212(d)(1); *State v. Bowling*, 958 S.W.2d 362, 363 (Tenn. Crim. App. 1997); *State v. Immanuel Eldridge Harney*, 2005 WL 94462, *2 (Tenn. Crim. App., at Nashville, Jan. 12, 2005). Therefore, the trial court was correct in finding that it was

divested of jurisdiction to hear the defendant's Rule 35 motion for sentence reduction. Accordingly, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE